Mohamed Azahari bin Matiasin v GBB Nandy @ Gaanesh (in his capacity as the President of the Sabah Law Association is sued/named as the respondent in this appeal proceedings pursuant to s 9(c) of the Societies Act 1966) & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–3304 OF 2010
MOHD HISHAMUDIN, AZAHAR MOHAMED AND BALIA YUSOF JJCA
26 JUNE 2013

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Legal Profession — Practice of law — Whether foreign counsel may appear in arbitration proceedings — Appointment of advocate and solicitor from Kuala Lumpur to act as co-counsel in arbitration proceedings in Sabah — Whether ought to be allowed — Interpretation of 'exclusive right to practice in Sabah' in s 8(1) of the Advocates Ordinance 1953

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The present appeal arose from the High Court's dismissal of the appellant's application for a declaration that foreign lawyers who were not advocates within the meaning of the Advocates Ordinance 1953 ('Ordinance') were not prohibited from representing parties to arbitration proceedings in Sabah. The appellant was a Sabah advocate practising in Kota Kinabalu and was counsel for one Borneo Samudera in an arbitration proceeding. Borneo Samudera intended to appoint an advocate and solicitor from Kuala Lumpur ('Mr Lam') to represent it as co-counsel to the appellant in the arbitration proceedings. However, the claimants' solicitors objected the appointment of Mr Lam on the ground that he was not an advocate in Sabah by virtue of s 8(1) of the Ordinance. The appellant filed an originating summons application seeking for a declaration that foreign lawyers who were not advocates within the meaning of the Ordinance were not prohibited from representing parties to arbitration proceedings in Sabah. In dismissing the appellant's application, the High Court judge held that based on trite principle to words in s 8 of the Ordinance, the phrase 'exclusive right to practice in Sabah' meant that lawyers admitted to the Sabah Bar have the exclusive rights to legal practice in both 'in and outside' courts. It was further held that a person who was not a member of the Sabah Bar who wished to carry out works similar to that of an advocate must apply for ad hoc admission to the local Bar. There was nothing in the Ordinance that stated that advocates admitted in Sabah have the exclusive right to represent parties at arbitration proceedings in the Sabah. The respondents contended that the words 'to practise' must be interpreted to mean to practise as a lawyer anywhere in Sabah, whether in courts or outside courts, such as at arbitration proceedings. The respondents argued that since Mr Lam was a lawyer, when he represented a party in an arbitration proceeding, he was in fact

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practising as an advocate in Sabah which he could not legally do unless he had been admitted as an advocate in Sabah. The appellant, on the other hand, submitted that the meaning of the words 'to practise in Sabah' was governed by the interpretation's in s 2 of the Ordinance. By reason of the provision, the exclusive right of advocates in Sabah to practise was linked to the exclusivity rights of barristers and solicitors in England. The appellant contended that reading s 8(1) of the Ordinance with the definition of 'to practise in Sabah' as prescribed by s 2(1) of the same Ordinance meant that if in England, by law, barristers and solicitors have the exclusive right of representation at arbitration proceedings, only then would advocates in Sabah enjoy a similar exclusive right in respect of arbitration proceedings in Sabah. Otherwise, advocates in Sabah do not enjoy exclusive right of representation in arbitration proceedings in Sabah. The appellant pointed out that in England, barristers and solicitors have no exclusive right to represent parties at arbitration proceedings and therefore, advocates in Sabah have no exclusive right of representation at arbitration proceedings in the Sabah.

Held, allowing the appeal with costs:
The court disagreed with the learned High Court judge on his understanding on the implication of the definition of the words 'to practise in Sabah' as prescribed by s 2(1) of the Ordinance in interpreting s 8(1) of the said Ordinance. By reason of the definition of the words 'to practise in Sabah' in s 2(1) of the Ordinance, the exclusivity of the right to practice for advocates in Sabah was tied up to the exclusive right of practice of barristers and solicitors in England. Since barristers and solicitors in England possessed no exclusive right of representation before arbitration proceedings in England, it followed that, therefore, advocates of Sabah also have no exclusive right of representation at arbitration proceedings in the Sabah (see para 18).

[Bahasa Malaysia summary

Rayuan ini berbangkit daripada penolakan Mahkamah Tinggi terhadap permohonan perayu untuk perisytiharan bahawa peguam-peguam asing yang bukan peguambela dalam maksud Ordinan Peguambela 1953 ('Ordinan') tidak dihalang daripada mewakili pihak-pihak kepada prosiding timbang tara di Sabah. Perayu adalah peguambela Sabah yang mengamalkan undang-undang di Kota Kinabalu dan adalah peguam untuk Borneo Samudera di dalam prosiding timbang tara. Borneo Samudera berniat untuk melantik peguambela dan peguamcara dari Kuala Lumpur ('En Lam') untuk mewakilinya sebagai peguam bersama kepada perayu di dalam prosiding timbang tara. Walau bagaimanapun, peguamcara penuntut membantah pelantikan En Lam atas alasan bahawa beliau bukan peguambela di Sabah mengikut s 8(1) Ordinan. Perayu memfailkan permohonan saman pemula memohon untuk perisytiharan bahawa peguam-peguam asing yang bukan peguambela dalam maksud Ordinan tidak dihalang daripada mewakili pihak-pihak kepada prosiding timbang tara di Sabah. Dalam menolak

permohonan perayu, hakim Mahkamah Tinggi memutuskan bahawa berdasarkan prinsip nyata kepada perkataan-perkataan di dalam s 8 Ordinan, frasa 'exclusive right to practice in Sabah' bermaksud bahawa peguam-peguam yang diterima masuk ke Badan Peguam Sabah mempunyai hak ekslusif kepada amalan undang-undang di kedua-dua 'in and outside' mahkamah. Ia selanjutnya memutuskan bahawa seseorang yang bukan ahli Majlis Peguam Sabah yang ingin menjalakan kerja-kerja yang sama kepada peguambela mesti memohon kemasukan *ad hoc* ke Badan Peguam tempatan. Tidak terdapat apa-apa di dalam Ordinan yang menyatakan bahawa peguambela-peguambela yang diterima di Sabah mempunyai hak eksklusif untuk mewakili pihak-pihak di prosiding timbang tara di Sabah. Responden-responden berhujah bahawa perkataan-perkataan 'to practise' mesti ditafsirkan untuk bermaksud peguam di mana-mana di Sabah, sama ada di mahkamah atau luar mahkamah, seperti di prosiding timbang tara. Responden-responden berhujah memandangkan En Lam adalah peguam, apabila beliau mewakili pihak di dalam prosiding timbang tara, dia sebenarnya mengamalkan undang-undang sebagai peguambela di Sabah yang mana dia tidak dapat dari segi undang-undang berbuat demikian kecuali diterima sebagai peguambela di Sabah. Perayu, sebaliknya, berhujah bahawa maksud perkataan-perkataan 'to practise in Sabah' dikawal oleh tafsiran dalam s 2 Ordinan. Atas sebab peruntukan, hak eksklusif peguambela-peguambela di Sabah untuk mengamalkan undang-undang adalah berhubung kepada hak eksklusif peguambela dan peguamcara di England. Perayu berhujah bahawa membaca s 8(1) Ordinan dengan definisi 'to practise in Sabah' seperti yang ditetapkan oleh s 2(1) Ordinan yang sama bermaksud bahawa jika di England, dari segi undang-undang, barrister dan peguamcara mempunyai hak eksklusif mewakili di prosiding timbang tara, hanya dengan itu bolehlah peguambela-peguambela di Sabah menikmati hak eksklusif yang sama berkaitan prosiding timbang tara di Sabah. Jika tidak, peguambela-peguambela di Sabah tidak akan menikmati hak eksklusif mewakili di dalam prosiding timbang tara di Sabah. Perayu menegaskan bahawa di England, peguambela dan peguamcara tidak mempunyai hak eksklusif untuk mewakili pihak-pihak di prosiding timbang tara dan oleh itu, peguambela-peguambela di Sabah tidak mempunyai hak eksklusif mewakili di prosiding timbang tara di Sabah.

Diputuskan, membenarkan rayuan dengan kos:
Mahkamah tidak bersetuju dengan hakim Mahkamah Tinggi atas pemahaman beliau atas implikasi definisi perkataan-perkataan 'to practise in Sabah' seperti yang ditetapkan oleh s 2(1) Ordinan dalam mentafsirkan s 8(1) Ordinan. Atas alasan definisi perkataan-perkataan 'to practise in Sabah' dalam s 2(1) Ordinan, hak eksklusif untuk mengamalkan undang-undang bagi peguambela-peguambela di Sabah adalah berkait kepada hak eksklusif mengamalkan undang-undang peguambela dan peguamcara di England. Memandangkan peguambela dan peguamcara di England tidak memiliki hak eksklusif mewakili di hadapan prosiding timbang tara di England, oleh itu,

peguambela-peguambela Sabah juga tidak mempunyai hak eksklusif mewakili prosiding timbang tara di Sabah (lihat perenggan 18).]

Notes

For a case on whether foreign counsel may appear in arbitration proceedings, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 1739.

Cases referred to

Datuk Hj Mohammad Tufail bin Mahmud & Ors v Dato Ting Check Sii [2009] 4 MLJ 165; [2009] 4 CLJ 449, FC (not folld)

Zublin Muhibbah Joint Venture v Government of Malaysia [1990] 3 MLJ 125, HC (refd)

Legislation referred to

Advocates Ordinance 1953 (Cap 2) ss 2, 2(1), 8, 8(1)
Arbitration Act 1996 [UK] s 36
Legal Profession Act 1976 ss 35(1), 36(1)

Appeal from: Originating Summons No K17–29 of 2010 (High Court, Kota Kinabalu)

Ho Kin Kong (Ho Chong Yong) for the appellant.
John Sikyanun (Luping & Co) for the first respondent.
Alex Decena (Christina Liew Chin Jin (CJ Liew & Co) for the second respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court of Kota Kinabalu dismissing the appellant's application for a declaration that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance 1953 (Sabah Cap 2) are not prohibited by the same Ordinance from representing parties to arbitration proceedings in Sabah.

[2] On 24 September 2012, after hearing submissions, we, unanimously, allowed the appeal with costs (costs is only ordered against the second respondent).

[3] We now give our grounds.

[4] There is an arbitration proceedings in Kota Kinabalu that is still ongoing. The parties in the arbitration proceedings are one Encik Samsuri bin Baharuddin and 813 others on one side, as the claimants, and a company called 'Borneo Samudera Sdn Bhd' ('Borneo Samudera'), on the other side, as the respondent. The appellant before us in this appeal, Encik Mohamed Azahari, is

a Sabah advocate practising in Kota Kinabalu; and is the counsel for Borneo Samudera at the arbitration proceeding. Borneo Samudera, however, intends to appoint one Mr Lam Ko Luen, an advocate and solicitor from Kuala Lumpur, to represent it as co-counsel to Encik Mohamed Azahari in the arbitration proceedings. But the claimants' solicitors, by notice, objected to Borneo Samudera engaging Mr Lam Ko Luen as co-counsel at the arbitration proceedings, on the ground that Mr Lam is not an advocates in Sabah and as such by reason of s 8(1) of the Advocates Ordinance 1953 (Sabah Cap 2) has no right to represent Borneo Samudera at the arbitration proceedings.

[5] This prompted the appellant to file an originating summons application seeking for a declaration that foreign lawyers who are not advocates within the meaning of the Advocates Ordinance 1953 (Sabah Cap 2) are not prohibited by the same Ordinance from representing parties to arbitration proceedings in Sabah.

[6] The learned High Court Judge of Kota Kinabalu dismissed the appellant's application.

[7] The reason given by the learned High Court judge for dismissing the appellant's application is as follows:

> Reverting to the issue at hand, I must follow the established rule of interpreting statutes and that is to give the words contained therein their natural meaning and construe that provision in the context of the whole statute. Applying that trite principle to words employed in s 8 of the Ordinance, I have no hesitation in holding and do hold that the phrase 'exclusive right to practice in Sabah' means that lawyers admitted to the Sabah Bar have the exclusive rights to legal practice in both 'in and outside' courts. In short, if someone who is not a member of the Sabah Bar wishes to carry out works similar to that of an advocate, he must apply for ad hoc admission to the local Bar.

[8] In our judgment, this appeal should be allowed. In our view, there is nothing in the Sabah Advocates Ordinance (Cap 2) that states that advocates admitted in Sabah have the exclusive right to represent parties at arbitration proceedings in the State of Sabah.

[9] The respondents, however, submit that advocates admitted in Sabah have the exclusive right of representation in arbitration proceedings in Sabah by reason of s 8(1) of the Advocates Ordinance. This provision reads:

Right to practise in Sabah

8(1) Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practise in Sabah and to appear and plead in the Federal Court in Sabah and in the High Court and in all courts in Sabah and in the High Court and in all courts in Sabah subordinate thereto in which advocates may appear, and as between themselves shall have the same rights and privileges without differentiation: …

[10] The respondents place emphasis on the words '… advocates shall have the exclusive right to practise in Sabah …' in sub-s (1) of s 8. The respondents contend that the words 'to practise' must be interpreted to mean to practise as a lawyer anywhere in Sabah, whether in courts or outside courts, such as at arbitration proceedings. The respondents argue that since Mr Lam is a lawyer, it follows that when he represents a party at an arbitration proceedings he is in fact practising as an advocate in Sabah. That he cannot legally do; unless he has been admitted as an advocate in Sabah.

[11] For their argument, the respondents rely on the Federal Court case of *Datuk Hj Mohammad Tufail bin Mahmud & Ors v Dato Ting Check Sii* [2009] 4 MLJ 165; [2009] 4 CLJ 449.

[12] The appellant, on the other hand, submits that the meaning of the words 'to practise in Sabah' is governed by the interpretation section in s 2 of the Advocates Ordinance. This section defines the words 'to practise in Sabah' in the following manner:

'to practise in Sabah' means to perform in Sabah

(a) any of the functions which in England may be performed by a member of the Bar as such;

(b) any of the functions which in England may be performed by a Solicitor of the Supreme Court of Judicature as such;

[13] The appellant submits that by reason of the above definition, the exclusive right of advocates in Sabah to practise is linked to the exclusivity rights of barristers and solicitors in England. The appellant argues that if we were to read s 8(1) of the Advocates Ordinance with the definition of 'to practise in Sabah' as prescribed by s 2(1) of the same Ordinance, then it means this: if in England, by law, barristers and solicitors have the exclusive right of representation at arbitration proceedings, only then would advocates in Sabah enjoy a similar exclusive right in respect of arbitration proceedings in Sabah. Otherwise, advocates in Sabah do not enjoy exclusive right of representation in arbitration proceedings in Sabah. And the appellant points out that in England barristers and solicitors have no exclusive right to represent parties at

arbitration proceedings (this fact is not disputed; and is accepted by the learned High Court judge). The appellant refers to s 36 of the UK Arbitration Act 1996 that states:

> 36 Legal or other representation
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> Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.

[14] Thus the appellant contends that it would follow that in Sabah advocates have no exclusive right of representation at arbitration proceedings in the State of Sabah.

[15] The appellant also relies on *Zublin Muhibbah Joint Venture v Government of Malaysia* [1990] 3 MLJ 125. This case concerns arbitration proceedings in west Malaysia. It also concerns ss 35(1) and 36(1) of the Legal Profession Act 1976. In this case, the court held that in west Malaysia a person representing a party in an arbitration proceedings need not be an advocate and solicitor within the meaning of the Legal Profession Act 1976; and that the Legal Profession Act has no application to an arbitration proceedings in West Malaysia.

[16] In the case that is now before us, at the High Court, the learned judge ruled that the meaning given to the words 'to practise in Sabah' by s 2 of the Advocates Ordinance does not assist the appellant; it has no bearing on the issue before the court. This is what the learned judge in his grounds of judgment said:

> In respect of the reliance on (sic) s (2)(1)(a)–(b) of the Ordinance, it is with respect without merit as the non exclusivity of barristers' and solicitors' appearance in arbitration proceedings in England is not relevant to the issue at hand which concerns the exclusivity of legal practice in Sabah. The fact that non lawyers are allowed to appear in arbitration in England in no way has any bearing on what the words 'practise in Sabah' mean.

[17] The learned High Court judge further held that *Zublin* can be distinguished from the present case in that the provisions of the Legal Profession Act of west Malaysia are different from the Advocates Ordinance of Sabah. In the Legal Profession Act of west Malaysia, s 35(1) provides:

> 35 Right of Advocate and Solicitor
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> (1) Any advocate and solicitor shall, subject to this act and any other written law, have the exclusive right to appear and plead in all Courts of Justice in Malaysia …;

whereas s 8(1) of the Sabah Advocates Ordinance provides:

A 8(1) Subject to subsection (2) and to section 9, advocates shall have the exclusive right to practise in Sabah …

B **[18]** With respect, whilst we agree with the learned High Court judge that on the facts *Zublin* can be distinguished (and, therefore, *Zublin* is not relevant for the purpose of the issue at hand), we, however, disagree with the learned judge on his understanding on the implication of the definition of the words 'to practise in Sabah' as prescribed by s 2(1) of the Sabah Advocates Ordinance in interpreting s 8(1) of the said Ordinance. We agree with the submission of the appellant that by reason of the definition of the words 'to practise in Sabah' in s 2(1) of the Advocates Ordinance, the exclusivity of the right to practice for advocates in Sabah is tied up to the exclusive right of practice of barristers and solicitors in England; and since barristers and solicitors in England have no exclusive right of representation before arbitration proceedings in England, it follows, therefore, that advocates of Sabah also have no exclusive right of representation at arbitration proceedings in the State of Sabah.

D **[19]** In our view, *Datuk Hj Mohammad Tufail bin Mahmud* does not in anyway support the position taken by the respondents. There, the facts and issues were different.

E **[20]** The declaration sought should be granted.

F **[21]** Appeal allowed with costs of RM10,000 to be paid by the second respondent to the appellant; declaration sought granted.

Appeal allowed with costs.

G Reported by Afiq Mohamad Noor

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